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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., *Petitioners*

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE ARKANSAS PUBLIC SERVICE COMMISSION

INTEREST OF THE ARKANSAS PUBLIC SERVICE COMMISSION

The Arkansas Public Service Commission (hereafter called "Arkansas" to avoid confusion with the Federal Power Commission, Petitioner) is the State Commission which is vested with the power and jurisdiction and has the duty to supervise and regulate every public utility within the State of Arkansas. This supervision and regulation is plenary and Arkansas is specifically ordered to prohibit any unreasonable preferences or rates as between locali-

ties or classes of service. Arkansas must determine the rates and charges of public utilities for public utility service, and it must determine and fix the terms and conditions of utility service. (Act 324 of the 1935 General Assembly of Arkansas, Ark. Stats. Anno. (1957 Repl.) §73-201, et. seq.). It must also approve contracts for the sale, on an interruptible basis, of utility services at agreed prices for terms not exceeding twenty-five years between utility companies and customers who use such services for manufacturing, generation, processing, preparation of products, or industrial purposes. (Act 4 of the 1965 General Assembly of Arkansas, Ark. Stats. Anno. (1957 Repl. Supp.) §73-275).

Arkansas believes that this case, in particular the issue dealing with the scope of jurisdiction of the Federal Power Commission (FPC), presents an issue which vitally affects the legitimate interests of the State of Arkansas, the utilities regulated by Arkansas, and the hundreds of thousands of customers served by those utilities. Arkansas further believes that it can and will present factual and legal matters not likely to be touched upon by the other parties hereto and it therefore files this amicus curiae brief.

SUMMARY OF ARGUMENT

A proper construction and application of the Natural Gas Act (15 U.S.C. §717) is involved in this case.

The Federal Power Commission (FPC) contends that it needs to have the power and jurisdiction to regulate curtailments of natural gas pipelines when a shortage of gas supply requires curtailment and it argues that §§ 1(b), 4(b), 5(a), 7(c) and 16 of that Act give it that jurisdiction.

We contend that §1(b) of the Act, as construed by this Court, and by lower courts, specifically deprives the FPC of jurisdiction over direct pipeline sales for consumptive use and that the FPC is therefore without jurisdiction to regulate curtailments of sales to direct, consumptive use customers.

We recognize that §7, as previously construed by the courts, gives the FPC jurisdiction to initially pass upon the application of a natural gas company for approval of a certificate authorizing such company to construct the facilities required to transport the gas involved in a direct sale but contend that this jurisdiction is exhausted when the certificate issues and does not give the FPC continuing jurisdiction over such sales.

Finally, it is our position (1) that the "need" asserted by the FPC does not actually exist and (2) even if it did exist, "need" does not supply administrative agency jurisdiction which has been withheld by the Congress.

ARGUMENT

One reading the FPC's brief is immediately and inescapably impressed by the fact that it addresses itself to the question of the *"need"* for the FPC to have the jurisdiction it claims to have rather than to the real issue which is whether or not the FPC in fact, and in law, has been granted that jurisdiction. For example, we are told: (1) at page 12 that the FPC's ability to allocate gas would be "impaired" if the lower court decision is sustained; (2) at page 13 that controversies such as the one which gave rise to this lawsuit "require" national resolution; (3) at page 18 that initial certificate approval ". . . does not obviate the *need* for (FPC) authority"; (4) again on page 18 (footnote 15) that abandonment authority does not ". . . satisfy the (FPC's) *need* for comprehensive authority over curtailments"; (5) at page 20 that only exclusive FPC jurisdiction can assure the uniformity *"necessarily demanded"*, etc.; (6) at page 21 that it is "essential" that contracts remain subject to the FPC's jurisdiction; (7) at page 26 that the problem ". . . *requires* an interstate solution. . ."; and (8) at page 27 that the FPC ". . . should not be denied the *necessary* tools (to assure a fair allocation of gas supplies)". (Emphasis ours).

We submit that the FPC has begged the question which, as the Court below correctly noted (Opinion Below, Mimeo. Ed. p. 19) is:

> "Does the FPC have the authority to modify or condition a certificate of public convenience and necessity issued for facilities used to make a direct sale? Or more briefly stated: Does the Commission have continuing certificate jurisdiction?"

We submit that the questions just posed must be answered in the negative and we now address ourselves to that issue.

THE FPC HAS NO JURISDICTION OVER DIRECT INDUSTRIAL SALES OF NATURAL GAS PIPELINES

Direct sales of gas by a pipeline for consumptive use (as opposed to sales for resale) are not, and never have been, subject to the jurisdiction of the FPC.

The FPC's natural gas jurisdiction is governed by Section 1(b) (15 U.S.C. §717(b)) of the Natural Gas Act (the Act) which reads:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but *shall not apply to any other transportation or sale* of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Emphasis Added).

Thus, Congress specifically excluded from FPC jurisdiction sales other than sales for resale. The Act's deprivation of FPC jurisdiction over direct sales as set forth in Section 1(b) was emphasized in the landmark Supreme Court case of *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 519 (1947):

> "This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale;

and (3) natural gas companies engaged in such transportation or sale.

"The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply *to any other* * * * *sale* * * *' (Emphasis added). Those words plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' *Direct sales for consumptive use of whatever sort were excluded.*

"The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, *quantities* or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." (Footnote omitted). (Emphasis Added).

The Supreme Court's holding in *Panhandle* in 1947 is as apt today as it was then, and it has since been reaffirmed and reiterated both by the courts and by the FPC. *City of Hastings v. FPC,* 221 F.2d 31 (D.C. Cir. 1954), *cert. denied,* 349 U.S. 920 (1955); *Colorado Interstate Gas Co. v. FPC,* 185 F.2d 357 (3d Cir. 1950); *Coastal Transmission Corporation, et al.,* 26 F.P.C. 318 (1961). Clearly, Section 1(b) is controlling in this proceeding and the lower court correctly held that the FPC lacks jurisdiction to approve curtailment policies for direct, consumptive use, customers of a gas pipeline company because such policies, of necessity, di-

rectly or indirectly affect sales to such customers over which the FPC has no jurisdiction.

Indeed, the FPC brief does not seriously question the proposition that the FPC has no direct sale jurisdiction. Instead, the FPC attempts to sustain its jurisdiction over curtailments on the theory that it has jurisdiction over "transportation" of natural gas in interstate commerce under Section 1(b) and Section 7(c) of the Act and that its "transportation" jurisdiction supplies the missing link which must be found in order to give it the curtailment jurisdiction which it has asserted. 1/

We do not so read the Act. Unfortunately for the FPC, the courts have not so construed the Act and the legislative history of the Act and Congressional action (and *in*action) since its original passage do not support such a construction.

It must be remembered that Section 1(b) of the Act does not grant the FPC any certificate jurisdiction over direct sales. On the contrary, it says that the Act "shall not apply to any" direct sale. Therefore, if FPC jurisdiction exists, it must be bottomed on Section 7(c) certificate jurisdiction. It is recognized that the FPC has required the certification of the facilities constructed to make a non-jurisdictional direct sale under Section 7(c) and such requirement has been upheld by the courts. However, Section

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1/ Contrary to the FPC's position on this point is a portion of the language quoted above from the **Panhandle** case, viz:

> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, **quantities** or otherwise." (Emphasis Added).

Clearly, "quantities" have to do with curtailments but the **Panhandle** case, in the language quoted, just as clearly denies that jurisdiction with respect to direct sales.

7(c) is a *facilities* section of the Act and the facilities involved in the transaction are the facilities of the natural gas pipeline. It is not the *sale* to a direct customer that is being certificated but changes in or additions to the facilities or the operation of facilities of the interstate pipeline.

Obviously, in determining whether or not it will *initially* issue a certificate to a pipeline the FPC must consider the effect of such issuance on the public convenience and necessity. *FPC v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1960). However, the FPC's authority to issue an initial certificate over pipeline facilities cannot bestow upon it the right to regulate a direct sale, the regulation of which is beyond the power of the FPC as set forth in Section 1(b). *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, supra. *A fortiori*, it does not give the FPC continuing authority over such a sale. A number of cases indicate that the FPC does not have such continuing jurisdiction.

In *Granite City Steel Company v. FPC*, 320 F.2d 711 (1963), a case analogous to the present situation [except that it was a Section 7(a) certificate case], a group of resale customers of Mississippi River Fuel Corporation, a natural gas pipeline, sought to have the pipeline's direct industrial customers curtailed and the gas reallocated to them. The Court, reversing the FPC, found that the FPC lacked the authority to so reallocate.

In *Colorado Interstate Gas Co. v. FPC*, 185 F.2d 357, at 359, 360 (3d Cir. 1950) the Court reversed an order by a divided FPC requiring a pipeline to file a "tariff application to all natural gas delivered to a buyer, whether or not for resale". There, as the FPC proposes to do here, the FPC was asserting continuing jurisdiction over a direct sale by

means of tariff provisions. The court would not permit it, saying:

> "[T]he power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress had conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales. Indeed the Commission itself recognized this in 1945 when in accepting Colorado Interstate's earlier tariff changes for filing it specified that they were to be effective only for sales 'for resale for ultimate public consumption'."

Two other cases in which the Courts have indicated the lack of post certificate jurisdiction over direct sales by the FPC are *Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission*, 341 U.S. 329 (1951) and *City of Hastings v. FPC*, 221 F.2d 31 (D.C. Cir. 1954).

Interestingly enough, the FPC has, on more than one occasion recognized its lack of direct sale jurisdiction as well as its lack of continuing jurisdiction over previously certificated direct sale facilities.

In a letter dated June 12, 1963 from the then FPC Chairman Joseph C. Swidler to the President of the Senate, Lyndon B. Johnson, transmitting legislation proposed by the FPC which would have amended the Act to give FPC

direct sale jurisdiction, Mr. Swidler stated (June 19, 1963, *Congressional Record*, p. 11084):

> "Under existing law the Commission's authority is limited to sales for resale in interstate commerce; hence, the price *and other terms* of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority." (Emphasis supplied)

The proposed amendments were never adopted by the Congress and it follows that if the FPC then (by its own admission) lacked jurisdiction over the "price *and other terms*" of direct sales of natural gas it still lacks that jurisdiction today. Further, without unduly belaboring the point, we would emphasize that regulation of curtailments, i.e., the volumes of gas delivered and when those volumes are delivered, most certainly constitutes the regulation of "other terms" of a direct sale and as Chairman Swidler correctly observed in 1963 ". . . are outside the sphere of (the FPC's) regulatory authority."

The *Transco* case (*FPC v. Transcontinental Gas Corp., supra*) furnishes a good example of historical recognition by the FPC of its lack of continuing jurisdiction over a direct sale once a certificate has issued. Briefly, Consolidated Edison Co. (Con. Ed.), an electric utility, had arranged for the purchase of quantities of gas directly from producers which gas it wished Transco to transport.[2]/ Transco was

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[2]/ Significantly, this Court concisely set forth the "no direct sale jurisdiction" rule as follows:

> "This transaction is commonly labeled a 'direct' sale **and, because it does not entail a sale for resale in interstate commerce, is not subject to the Commission's jurisdiction** except insofar as Section 7 requires the Commission to certificate the transportation of gas pursuant to the sale." 365 U.S. 1 at 4. (Emphasis Added).

compelled to seek a transportation certificate from the FPC which the FPC denied. This Court's opinion noted (365 U.S. at page 5) that the FPC staff "vigorously" opposed the grant of certificate and gave as one reason for opposition that ". . . authorization of this and similar direct sales to major industrial users would result in pre-emption of pipeline capacity and gas reserves to the detriment of domestic consumers competing for gas supply. . .". The point we are making is that the FPC tacitly admitted by making this argument that it had no continuing jurisdiction over even the "transportation" once the certificate had been granted. Otherwise, there would have been no need for concern about the possibility that at some time in the future the direct sale gas would over load the capacity of the pipelines because *if* the FPC had the continuing jurisdiction it now asserts it has it could simply deal with that situation when it arose. However, it obviously (and correctly) thought its jurisdiction had been exhausted when it granted the certificate.

The FPC's argument that it "needs" curtailment jurisdiction is partially based on its asserted fear that some sort of regulatory gap might be created if it were not granted the jurisdiction it seeks. It couples this argument with gloomy predictions of the chaos that might result if "uniform" regulation at the "national level" is not established. This is just another way of stating its basic premise that "the FPC *needs* full regulatory power because it, and it alone, can do the job." (See, e.g.: FPC Brief pp. 13, 18, 20 and 26). If the FPC argument were carried to its logical conclusion, *nothing* would be left for state regulation even though we have shown (and will show) that the right of the states to regulate many aspects of the sale and transportation of natural gas has always been recognized by

Congress and the Courts and even admitted by the FPC itself.

A brief look at the legislative history of the Act might prove instructive. One of the first cases involving the Act to reach this Court after its passage in 1938 was *Illinois Natural Gas Company v. Central Illinois Public Service Company*, 314 U.S. 498 (1941). In that case this Court quoted from the House Committee Report on the bill which became the Act as follows:

> "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. *The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation.* (Cite omitted). *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.*" 314 U.S. 498 at 506. (Emphasis Added).

We have already pointed out that the FPC sought, in 1963, to broaden its powers to give it direct sale jurisdiction and thereby ". . . disturb the States in their exercise of such jurisdiction. . ." but was unsuccessful in its attempt. Thus, thirty-four years ago when it passed the Act, Congress initially recognized the right of state regulation and as recently as 1963 refused to disturb that right.

While not doubting the sincerity of the FPC's argument that chaos would result absent national regulation of curtailments, we view this argument as a strawman and do not share the FPC's concern because we do not believe that the disastrous consequences it predicts (absent central regulation) will actually occur. The best evidence to

refute the FPC's contention is found in the matter of rate regulation. The FPC admits that it has no *rate* jurisdiction over direct sales of natural gas. See: FPC Brief, pp. 13-14 and 22.[3]/ Thus, by the FPC's own admission, the fifty states are free to go their own separate ways in the matter of direct sale rate regulation — and have done so. It is difficult to imagine a more important term or condition of a sale than the price at which that sale is made yet the several states are free to, and do, regulate direct gas sale prices and the Republic has survived despite the lack of uniformity at the national level on that score.

Further, the "gap" in regulation that the FPC assertedly fears, need not exist. It certainly does not and will not exist in the State of Arkansas. On August 9, 1971, in Docket U-2307, following extended hearings comprising a transcript of well over four thousand pages, Arkansas withdrew its prior approval of approximately fifty gas sales contracts entered into between Arkansas Louisiana Gas Company (the largest natural gas company doing business in Arkansas) and numerous of its large industrial customers. The Order dealt with the matter of such direct sale contracts in considerable detail, contained an extended discussion of the issues before Arkansas, made exhaustive findings of fact and set forth detailed and specific orders

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[3]/ That concession alone should be sufficient to dispel any lingering doubt about the FPC's jurisdiction. This is so because the "rate" paid by a direct sale customer is not limited solely to the price per Mcf which it pays for gas. The volumes which the customer can count on receiving are an intrinsic part of the factors which a customer considers in agreeing upon a price for the service. An unagreed upon reduction in those volumes means that that the value of the service has decreased. In other words, the customer is paying the same amount of money but getting a poorer quality of service in exchange. It is axiomatic that a constant payment for reduced value is the equivalent of a higher payment for a constant value and is, in effect, a rate increase over which, as noted, the FPC admittedly has no jurisdiction.

(covering, among other things, *curtailment priorities* in the event of shortage of gas supply) with respect to the contracts. In its order, Arkansas made it clear that further proceedings affecting such contracts would be instituted by it and such proceedings are now, in fact, under way. Under the heading "Interest of the Arkansas Public Service Commission", *supra,* we described Arkansas' jurisdiction. The Order referred to above is far too lengthy to quote or even to discuss in more detail but we have had it printed and attached as Appendix A to this brief as proof positive that Arkansas not only has "paper" jurisdiction but has asserted that jurisdiction and has and is vigorously exercising its asserted jurisdiction.

We have gone to considerable length in demonstrating the FPC's total lack of continuing jurisdiction over direct sales of gas for consumptive use in order to dispose of its argument that curtailment authority (over such sales) is found in Sections 4, 5 and 16 of the Act. (15 U.S.C. 717c, 717d and 717o, respectively). (FPC Brief pp. 26, et. seq.). The FPC points specifically to sections 4(b) and 5(a), which deal with undue preferences and discrimination, as being sources of jurisdiction. However, the FPC was good enough to include quotations from those sections in its brief (§ 4(b) at page 27 and § 5(a) at page 28). Careful reading of those quotations will reveal to the Court that, far from being a *grant* of jurisdiction, each of those sections carries forward the limitations on FPC jurisdiction discussed hereinabove since each section contains the limiting phrase ". . . any transportation or sale of natural gas *subject to the jurisdiction of the* (FPC) . . ." (Emphasis ours). We have shown that the FPC has no jurisdiction over direct sales for consumptive use and the two sections last referred to thus add nothing to the FPC's authority.

It borders on the facetious to argue that § 16 is a source of curtailment jurisdiction. That section is merely a catch-all giving the FPC the necessary incidental powers ". . . to carry out the provisions of this Act." Matters specifically excluded from coverage of the Act, such as direct sales, cannot be slipped back in by general language such as that quoted.

In short, as we pointed out at the outset of this brief, the FPC's principal argument is that it "needs" this jurisdiction and *must* therefore have it whether or not the Congress has given it that authority. Statutes cannot be so loosely construed and power withheld by Congress cannot be so easily usurped by agency fiat. On this subject, this Court said, in *F.T.C. v. Raladam Company*, 283 U.S. 643 at 649 that:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. *If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers;* nor can they be created by the courts in the proper exercise of their judicial functions." (Emphasis Added).

Finally, we could not choose better words to lay to rest the "need" argument than those of the lower court where it said (Opinion Below, Mimeo. Ed. p. 19):

> "FPC asserts. . . that it *'needs'* to have this jurisdiction to make effective what it conceives to be the full extent of its regulatory powers. We deny this assertion. Even conceding that FPC powers are as broad as it asserts, no amount of need alone can create federal agency power if Congress has not expressly or impliedly granted it. Necessity may be the mother of

invention, but need must have the paternal spouse — a legislative grant — to beget agency authority."

In other words, if FPC is unhappy with its statutory jurisdiction and feels that it "needs" more and broader jurisdiction, it should (as it unsuccessfully did in 1963) go to Congress and seek to have its statutory power enlarged. Unless and until it does so, it should not be allowed to exercise power it does not have merely because it divines a need for that power.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals was correct on the issue of jurisdiction of the FPC and that Court's judgment, on that issue, should therefore be affirmed.

Respectfully submitted,

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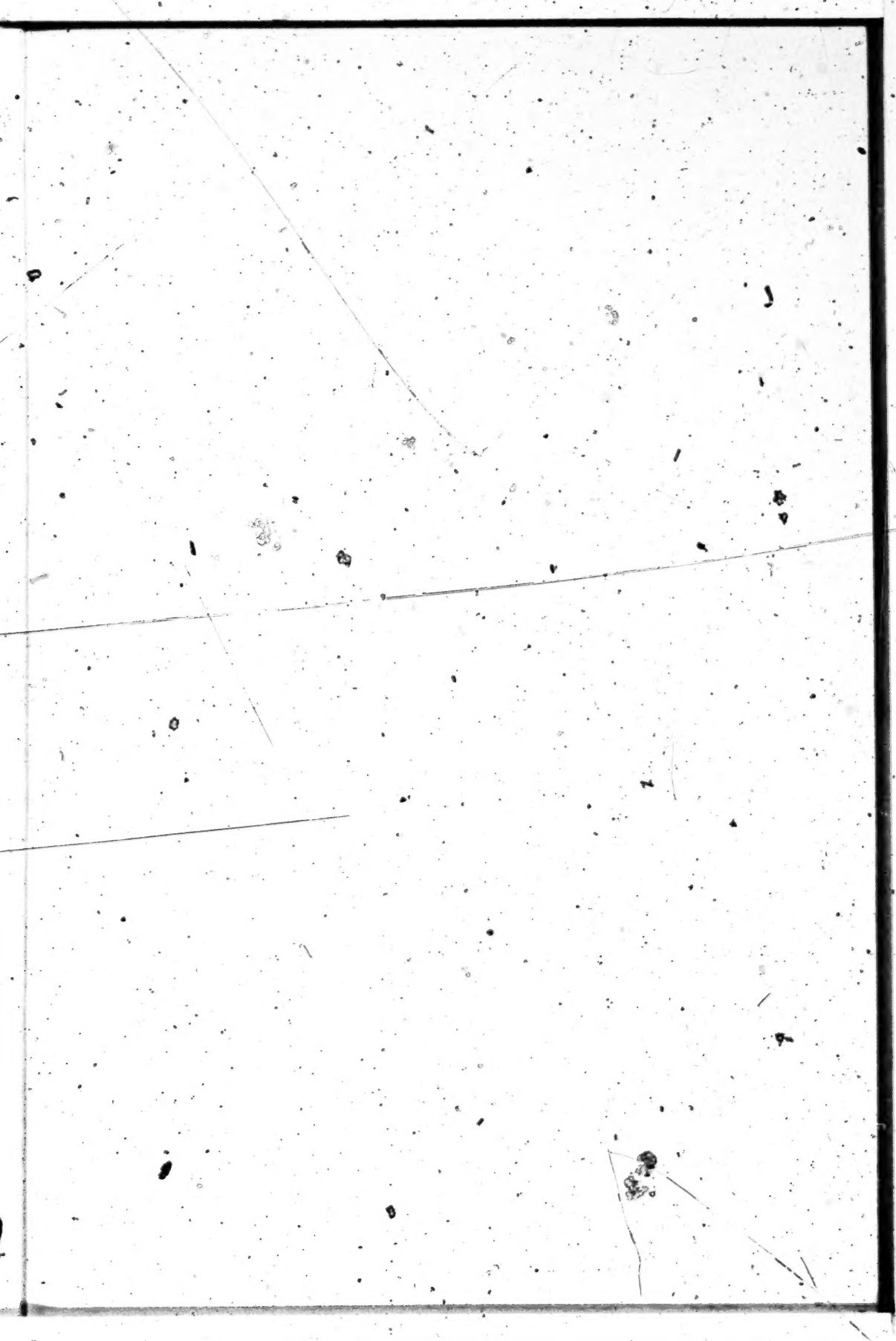
April, 1972.



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APPENDIX

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